

1 JASON LEE BACHMEIER  
2 CSP-CORCORAN SHU  
3 P.O. BOX 3481 4BHR-18  
4 CORCORAN, CA 93212  
5 # R5X914

FILED

09 MAR -3 PM 1:24

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

6 IN THE UNITED STATES DISTRICT  
7 COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

8  
9  
10 JASON LEE BACHMEIER,

11 PETITIONER,

12 V.

13 D. ADAMS, WARDEN,

14 RESPONDENT.

15 NO. C 07-2924 JF (PR)

16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
OPPOSITION TO MOTION TO DISMISS HABEAS  
PETITION AS UNTIMELY ; AND ,  
DECLARATION IN SUPPORT

PETITIONER, JASON LEE BACHMEIER, HEREBY REQUEST THE  
COURT TO DENY RESPONDENT'S MOTION TO DISMISS THE PETITION FOR WRIT  
OF HABEAS CORPUS AS UNTIMELY (DATED : FEBRUARY 7, 2008).

PROCEDURAL ISSUES

PETITIONER AGREES THAT THE PETITION IS GOVERNED BY  
THE ANTITERISM AND EFFECTIVE DEATH PENALTY ACT ("AEDPA")  
IN 28 U.S.C § 2244 (d). HOWEVER, PETITIONER CONTENTS THAT A  
HABEAS PETITION ALLEGED AS UNTIMELY CAN BE HEARD ON THE MERITS  
WHEN EXTRAORDINARY CIRCUMSTANCES IS RESPONSIBLE FOR THE DELAY  
IN FILING TO PRESERVE FUNDAMENTAL FAIRNESS .

1 THERE HAVE BEEN NO STATE PROCEDURAL DEFAULTS .  
2  
3

4  
5 ARGUMENT  
6  
7

8 PETITIONER IS AN INMATE HOUSED AT CORCORAN STATE PRISON  
9 SECURITY HOUSING UNIT ("SHU").  
10  
11

PETITIONER IS A LAYMAN AT LAW AND LACKS IN EDUCATION AND  
12 KNOWLEDGE OF THE AEDPA.  
13  
14

PRISON AUTHORITIES AND STAFF AT CORCORAN SHU FAIL TO PROVIDE  
15 CURRENT LEGAL MATERIALS IN THE PRISON LAW LIBRARY.  
16  
17

ACCESS TO LAW LIBRARY IS LIMITED DUE TO LIMITED SPACE,  
18 LACK OF STAFF, AND SECURITY RESTRICTIONS.  
19  
20

FURTHERMORE, PETITIONER CONTENDS THAT THE STATE COURT  
21 UNREASONABLY DETERMINED THE FACTS, AND THAT THE FACTS WHICH THE STATE  
22 COURT FOUND ARE CONTRADICTED BY CLEAR AND CONVINCING EVIDENCE IN THE  
23 RECORD ; AND THAT THE STATE COURT'S CONCLUSIONS OF LAW ARE CONTR-  
24 ARY TO, AND CONSIST OF AN UNREASONABLE APPLICATION OF, CLEARLY  
25 ESTABLISHED LAW AS DETERMINED BY U.S. SUPREME COURT.

IN THE INSTANT CASE, THE STATE COURT UNREASONABLY DET-  
26 ERMINED THAT THE RESTITUTION FINE OF \$ 5,000 WAS WELL WITHIN  
27 THE TRIAL COURT'S DISCRETION. (SEE RESPONDENT'S MOTION TO DISMISS  
28 AT EXHIBIT 2 PAGE 1.)

GOVERNMENT CODE SECTION 13967 SUBDIVISION (A) STATES IN  
29 PERTINENT PART :  
30  
31

32 ... IF THE PERSON IS CONVICTED OF  
33 ONE OR MORE FELONY OFFENSES, THE  
34 COURT SHALL IMPOSE A SEPERATE AND  
35 ADDITIONAL RESTITUTION FINE OF NOT  
36  
37

1 LESS THAN TWO HUNDRED DOLLARS  
2 (\$ 200), SUBJECT TO THE DEFEN-  
3 DANT'S ABILITY TO PAY ...  
4 (GOV. CODE, SEC. 13967, SUBD (a))

5 THE ABILITY TO PAY MUST BE CONSIDERED BY THE SENTENCING COURT  
6 BEFORE ORDERING ANY AMOUNT OF RESTITUTION FINE. AND THERE MUST BE  
7 SUBSTANTIAL EVIDENCE TO SUPPORT A DEFENDANT'S ABILITY TO PAY.

8 THE FUTURE CONSIDERATION OF ABILITY TO PAY IS IMPLIEDLY ADDRESSED  
9 BY GOVERNMENT CODE SECTION 13967.5 WHICH REQUIRES PAYMENT OF THE  
10 RESTITUTION FINE WITHIN 60 DAYS TO AVOID AN ASSESSMENT OF COLLECTION  
11 COSTS, LOOKING TO "CASH ON HAND".

12 IF NOT PAID WITHIN 60 DAYS OF THE JUDGEMENT THE FINE BECOMES  
13 A DEBT OWED TO THE STATE ENFORCEABLE IN THE MANNER PROVIDED  
14 FOR ENFORCEMENT OF MONEY JUDGEMENT. (GOV. CODE SEC. 13967.5  
15 SUBD. (b))

16 FURTHER INSTRUCTION AS TO THIS QUESTION IS FOUND FROM THE  
17 ASSEMBLY COMMITTEE OF PUBLIC SAFETY REPORT WRITTEN PERTAINING TO  
18 SENATE BILL 1444. IN AMENDING GOVERNMENT CODE SECTION 13967,  
19 SUBDIVISION (a), THE ASSEMBLY COMMITTEE ON PUBLIC SAFETY  
20 (JUNE 30, 1992, SB 1444) ADDRESSED THE "ABILITY TO PAY" AMEND-  
21 MENT OF GOVERNMENT CODE AS FOLLOWS :

22 THE TERM "ABILITY TO PAY" MEANS THE OVERALL  
23 CAPABILITY OF DEFENDANT TO PAY THE COST'S SET BY THE COURT.  
24 THE COURT MUST CONSIDER THE DEFENDANT'S PRESENT FINANCIAL  
25 POSITION ; LIKELIHOOD THAT DEFENDANT SHALL BE ABLE TO OBTAIN

26  
27 1 THE PHRASE "SUBJECT TO DEFENDANT'S ABILITY TO PAY"  
28 WAS ADDED BY AMENDMENT EFFECTIVE SEPTEMBER 14, 1992.

1 EMPLOYMENT WITHIN THE SIX MONTH PERIOD FROM THE DATE OF THE  
 2 HEARING; ANY OTHER FACTORS WHICH MAY BEAR UPON THE DEFEN-  
 3 DANT'S FINANCIAL CAPABILITY. (REPORT, AT P. 3 EMPHASIS ADDED)

4       THUS, THE LEGISLATIVE INTENT LIMITS CONSIDERATION  
 5 OF FUTURE EARNINGS TO "REASONABLY DISCERNIBLE FUTURE  
 6 FINANCIAL POSITION" AND LIKELIHOOD OF EMPLOYMENT WITHIN  
 7 SIX MONTHS FROM THE DATE OF HEARING. CONSIDERATION OF LONG  
 8 TERM ABILITY TO PAY ESPECIALLY WITHOUT ARTICULABLE FACTS TO  
 9 SUPPORT SUCH A FUTURE ABILITY TO PAY, IS, THEREFORE, INCON-  
 10 SISTENT WITH LEGISLATIVE INTENT.

11       IT IS ALSO INSTRUCTIVE TO LOOK AT THE DEFINITION  
 12 OF "ABILITY TO PAY" IN OTHER PENAL CODE SECTIONS. SECTION  
 13 1203.1 C DETAILS THE NATURE OF THE HEARING INTO DEFEN-  
 14 DANT'S ABILITY TO PAY AND DEFINES "ABILITY TO PAY" AS THE  
 15 "OVERALL CAPABILITY OF THE DEFENDANT TO REIMBURSE THE  
 16 COSTS" INCLUDING (1) PRESENT FINANCIAL OBLIGATIONS (2) REAS-  
 17 SONABLY DISCERNIBLE FUTURE FINANCIAL POSITION "IN NO  
 18 EVENT SHALL THE COURT CONSIDER A PERIOD OF MORE THAN ONE  
 19 YEAR "FROM THE DATE OF THE HEARING" FOR PURPOSES OF DETERMINING  
 20 REASONABLE DISCERNIBLE FUTURE POSITION) AND (3) "LIKELIHOOD  
 21 THAT THE DEFENDANT SHALL BE ABLE TO OBTAIN EMPLOYMENT  
 22 WITHIN THE ONE YEAR PERIOD FROM THE DATE OF THE HEARING."  
 23 (CA. PEN. CODE, SEC. 1203.1 C, SUBD. (b)).

24       CALIFORNIA PENAL CODE SECTION 1463.14, SUBDIVISION  
 25 (C) DEFINES ABILITY TO PAY AS "THE OVERALL ABILITY OF A DEFENDANT  
 26 TO PAY, TAKING INTO CONSIDERATION" (A) "PRESENT FINANCIAL OBLIG-  
 27 ATIONS INCLUDING FAMILY SUPPORT OBLIGATIONS, AND FINES, PENALTIES  
 28 AND OTHER OBLIGATIONS TO THE GOVT" (B) "REASONABLY DISCR-

1 NIBLE FUTURE FINANCIAL POSITION OVER THE NEXT 12 MONTHS".

2       THUS THE LEGISLATURE HAS ADDRESSED THE DEFINITION  
3 OF "ABILITY TO PAY" IN MANY CONTEXTS -- LIMITING CONSIDER-  
4 ATION OF FUTURE ABILITY TO PAY TO SIX TO TWELVE MONTHS. CON-  
5 SIDERING THIS AND ALSO BASED UPON THE EXPRESS LANGUAGE IN  
6 THE REPORT OF THE ASSEMBLY COMMITTEE ON PUBLIC SAFETY  
7 (JUNE 30, 1992, SB 1444), IT IS UNequivOCAL THAT THE  
8 LEGISLATURE INTENDED THAT THE CONSIDERATION OF A DEFENDANT'S  
9 FUTURE FINANCIAL ABILITY BE LIMITED TO MORE THAN SIX  
10 MONTHS FROM THE DATE OF THE HEARING.

11       CONSIDERATION OF PETITIONER'S POTENTIAL EARNINGS  
12 IS ALSO INAPPROPRIATE. IN THE INSTANT CASE, THE SENTENCING COURT  
13 IMPOSED A \$5,000 FINE BASED ON THE ERRONEOUS ASSUMPTION THAT  
14 PETITIONER COULD PAY THE FINE OUT OF HIS EARNINGS WHILE INCAR-  
15 CERATED IN CALIFORNIA STATE PRISON SYSTEM. THE RATE OF PAY FOR  
16 WORK PERFORMED BY PRISON INMATES ARE SET FORTH IN THE CAL-  
17 IFORNIA DEPARTMENT OF CORRECTIONS OPERATIONS MANUAL ("DOM"),  
18 SECTION 51120.7. FURTHERMORE, NOT ALL INSTITUTIONS UNDER THE  
19 CALIFORNIA DEPARTMENT OF CORRECTIONS STRICTLY FOLLOW THE DOM  
20 § 51120.7. SOME INSTITUTIONS MAKE NO PAY NUMBERS AVAILABLE.

21       IN THE INSTANT CASE, PETITIONER'S TOTAL INCARCERATION  
22 HAS BEEN IN LORROKAN STATE PRISON - SHU. WHERE NO WORK ASSIGN-  
23 MENTS ARE ISSUED. MAKING A PAY NUMBER LITERALLY UNAVAILABLE.  
24 THUS, PETITIONER HAS NOT PAID ONE CENT TOWARDS THE \$5,000 FINE  
25 IMPOSED BY THE COURT.

26       MOREOVER THE COURT COULD NOT HAVE JUSTIFIABLY, ALBEIT  
27 TACTICALLY, ASSUME THAT A PRISONER WOULD BE ABLE TO PAY THE  
28 FINE FROM EARNINGS FROM EMPLOYMENT AFTER HIS RELEASE. IN

1 THE INSTANT CASE, PETITIONER ONLY WORKED OCCASIONALLY. IT IS  
2 THEREFORE EXCEEDLY DOUBTFUL WHETHER PETITIONER WILL BE ABLE  
3 TO EARN MUCH AFTER BEING AWAY FROM A TRADE FOR SO LONG, ALSO  
4 BEING AN EX-LON ON PAROLE WOULD NOT BE CONDUCIVE TO BEING  
5 STEADILY EMPLOYED AFTER HE IS EVENTUALLY RELEASED FROM PRISON.

6 THE SENTENCING COURT EXCEEDED IT'S STATUTORY POWER WHEN  
7 IT IMPOSED A FINE WITH NO SUFFICIENT EVIDENCE TO SUPPORT PETITION-  
8 ER'S ABILITY TO PAY. THEREFORE, THE STATE'S CONCLUSION TO IMPOSE  
9 A FINE OF \$5,000 WITHOUT FIRST ADDRESSING PETITIONER'S ABILITY TO  
10 PAY IS UNREASONABLE AND CONTRARY TO CLEARLY ESTABLISHED LAW.

11 PETITIONER CONTINUED THAT THE STATE COURT UNREASONABLY  
12 DETERMINED THE FACTS, AND THAT THE FACTS WHICH THE STATE COURT  
13 FOUND ARE CONTRADICTED BY CLEAR AND CONVINCING EVIDENCE IN  
14 THE RECORD; AND THAT THE STATE COURT'S CONCLUSIONS OF LAW ARE  
15 CONTRARY TO, AND CONSIST OF AN UNREASONABLE APPLICATION OF,  
16 CLEARLY ESTABLISHED LAW AS DETERMINED BY U.S. SUPREME COURT:

17 WHEN IT CONCLUDED THAT PETITIONER FAILS TO  
18 DEMONSTRATE THAT TRIAL COUNSEL'S FAILURE TO OBJECT FELL BELOW  
19 A STANDARD OF REASONABLE COMPETENCE, OR THAT THERE IS A REASON-  
20 ABLE PROBABILITY THAT A MORE FAVORABLE FINE WOULD HAVE BEEN  
21 IMPOSED HAD TRIAL COUNSEL OBJECTED. (SEE RESPONDANT'S MOTION  
22 TO DISMISS AT EXHIBIT 2, PAGE 1.)

23 EVERY PERSON ACCUSED OF A CRIME IS ENTITLED TO A CONSTIT-  
24UTIONALLY ADEQUATE LEGAL DEFENSE CONSISTING OF THE SERVICES  
25 OF A REASONABLY COMPETENT ATTORNEY ACTING AS A DILIGENT CONSC-  
26 IENTIOUS ADVOCATE.

27  
28 ON APPEAL, TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL, THE

1 APPELLANT MUST SHOW : 1) THE TRIAL COUNSEL FAILED TO ACT IN A  
 2 MANNER TO BE EXPECTED OF A REASONABLY COMPETENT ATTORNEY ACTING  
 3 AS A DELIGENT ADVOCATE AND, 2) THERE IS A REASONABLE PROBABILITY  
 4 THAT A MORE FAVORABLE DETERMINATION WOULD HAVE RESULTED IN THE  
 5 ABSENCE OF COUNSEL'S FAILINGS .

6 THE UNITED STATES SUPREME COURT IN STRICKLAND V. WASHING-  
 7 TON (1984) 466 U.S. 668, 693-694 [80 L.E.D. 2d 674, 104 S.Ct. 2052]  
 8 DETERMINED THE REASONABLE PROBABILITY IS NOT A SHOWING THAT  
 9 "COUNSEL'S CONDUCT MORE LIKELY THAN NOT ALTERED THE OUTCOME  
 10 IN THE CASE," BUT SIMPLY "A PROBABILITY SUFFICIENT TO UNDER-  
 11 MINE CONFIDENCE IN THE OUTCOME."

12 FINALLY, IT MUST BE SHOWN, FROM THE RECORD, OR IN A  
 13 HABEAS CORPVS PROCEEDING, THAT COUNSEL'S PERFORMANCE WAS NOT  
 14 THE RESULT OF A TACTICAL DECISION WITHIN THE RANGE OF REASONABLE  
 15 COMPETENCE .

16 IN THE INSTANT CASE, CONSIDERING PETITIONER'S ECONOMIC  
 17 STATUS, ITS CLEAR AND CONVINCING, HIS ABILITY TO PAY IN THE FORESEEABLE  
 18 FUTURE IS ZERO. HIS COUNSEL'S DUTY TO OFFER VIABLE DEFENSES IN  
 19 HIS BEHALF CLEARLY INCLUDE DEFENDING AGAINST IMPOSITION OF AN  
 20 EXCESSIVE RESTITUTION FINE. THUS, IN THE AREA OF THE RESTITUTION  
 21 FINE COUNSEL DID NOT ACT AS A DELIGENT ADVOCATE .

22 FURTHERMORE, PETITIONER'S ECONOMIC STATUS, AND THAT  
 23 HE NEVER WAS ASSIGNED A WORK ASSIGNMENT, AND TO DATE HAS  
 24 NOT PAID ANY PORTION OF THE \$ 5,000 FINE ALLOWS A DETERM-  
 25 INATION THAT THERE WAS A REASONABLE PROBABILITY THAT THE LOWER  
 26 RESTITUTION FINE WOULD HAVE RESULTED FRIM A HEARING ON PETITIONER'S  
 27 ABILITY TO PAY IN THE REASONABLE FORESEEABLE FUTURE.

28 "

1 FINALLY, THE NATURE OF INEFFECTIVE ... FAILURE TO OBJECT  
2 TO AN EXCESSIVE FINE ... COULD NOT BE A RESULT OF A TACTICAL  
3 DECISION WITHIN THE RANGE OF REASONABLE ADVOCACY.

4 IN SUM, THE FAILURE TO REQUEST AN EXPRESS DETERMINATION  
5 OF PETITIONER'S ABILITY TO PAY WAS AN INEFFECTIVE ASSISTANCE OF  
6 COUNSEL. (ALSO, IN THE INSTANT CASE, STOLEN ITEMS WERE RETURNED TO  
7 OWNERS.)

8 CONCLUSION

9  
10 FOR THE ABOVE REASONS, PETITIONER RESPECTFULLY REQUESTS  
11 THE COURT DENY RESPONDANT'S MOTION TO DISMISS HABEAS PETITION  
12 AND HEAR IT ON THE MERITS.

13  
14  
15  
16  
17  
18  
19  
20  
21 DATED: FEB 22, 2008

  
22 JASON LEE BALCHMEIER  
23 PETITIONER IN PRO PER  
24  
25  
26  
27  
28

**PROOF OF SERVICE BY MAIL**

**BY PERSON IN STATE CUSTODY**

(Fed. R. Civ. P. 5; 28 U.S.C. § 1746)

I, JASON LEE BACHMEIER, declare:

I am over 18 years of age and a party to this action. I am a resident of \_\_\_\_\_

GSP - CORCORAN

Prison,

in the county of KINGS,

State of California. My prison address is: P.O BOX 3481 4B4R-18

CORCORAN, CA 93212

On FEBRUARY 22, 2008

(DATE)

I served the attached: OPPOSITION TO MOTION TO DISMISS ; AND ,

DECLARATION IN SUPPORT

(DESCRIBE DOCUMENT)

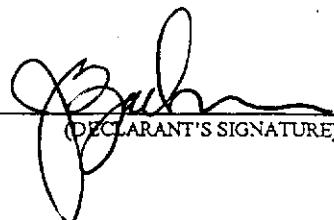
on the parties herein by placing true and correct copies thereof, enclosed in a sealed envelope, with postage thereon fully paid, in the United States Mail in a deposit box so provided at the above-named correctional institution in which I am presently confined. The envelope was addressed as follows:

CLERK'S OFFICE : U.S DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
450 GOLDEN GATE AVENUE, 16TH FLOOR  
SAN FRANCISCO, CA 94102

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on FEB 22, 2008

(DATE)

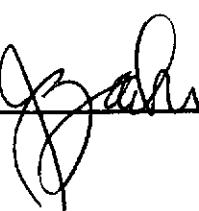
  
(DECLARANT'S SIGNATURE)

1 DECLARATION OF : JASON L. BACHMEIER, K52314  
2 CSP CORCORAN 4B4R:KB  
3 PD BOX 3481 SHU  
4 CORCORAN, CA 93212

5 I, JASON LEE BACHMEIER, DECLARE THAT:

- 6 1) I AM 18 YEARS OF AGE AND PARTY OF THIS ACTION;
- 7 2) I AM INCARCERATED CORCORAN STATE PRISON, SHU;
- 8 3) I AM A LAYMAN AT LAW AND LACK IN EDUCATION AND KNOWLEDGE  
9 OF THE AEDPA.;
- 10 4) PRISON AUTHORITIES AND STAFF AT CORCORAN SHU FAIL TO PROVIDE  
11 CURRENT LEGAL MATERIALS IN PRISON LAW LIBRARY;
- 12 5) ACCESS IN LAW LIBRARY IS VERY LIMITED DUE TO LACK OF SPACE,  
13 LACK OF STAFF AND SECURITY RESTRICTIONS;
- 14 6) I HAVE BEEN HELD IN CORCORAN SHU THROUGHOUT THE DURATION  
15 OF MY INCARCERATION;
- 16 7) WORK ASSIGNMENTS ARE NOT ISSUED TO PRISONERS IN SHU;
- 17 8) PAY NUMBERS ARE UNAVAILABLE IN SHU;
- 18 9) I HAVE PAID ZERO TOWARDS THE \$5000 RESTITUTION FINE;
- 19 10) STOLEN ITEMS WERE RETURNED TO OWNERS.

20  
21  
22 I DECLARE UNDER THE LAWS OF THE UNITED STATES OF AMERICA  
23 THAT THE FORGOING IS TRUE AND CORRECT. (28 U.S.C. § 1746)

24  
25 EXECUTED on FEB 22, 2008 SIGNATURE 

1 DEAR CLERK,

2 ENCLOSED IS ONE ORIGINAL COPY OF MY "OPPOSITION  
3 TO DISMISS HABEAS..." CAN YOU PLEASE FILE IT IN YOUR  
4 COURT?

5 FURTHERMORE, INCLOSED IS A COPY OF THE COVER  
6 PAGE TO SAID OPPOSITION. CAN YOU PLEASE STAMP IT AND  
7 RETURN IT TO ME FOR MY FILES? (S.A.S.E. IS ALSO ATTACHED)

8 THANK YOU

9  
10 FEB 22, 2008

  
11 JASON L. BACHMEIER

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

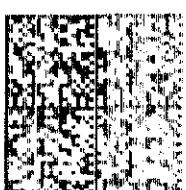
JASON L. BAUMMEIER K5X314

CSP-CORCORAN 4B4R-18

P.O. BOX 3481

CORCORAN, CA 93214

CONVICTATE STATE PRISON



Haster

\$0 1.40  
02/28/2008

US POSTAGE  
MAILED FROM B-32

CLERK'S OFFICE: U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
450 GOLDEN GATE AVENUE, 16<sup>TH</sup> FLOOR  
SAN FRANCISCO, CA 94102

LEGAL MAIL